

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION**

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LEWIS COSBY, KENNETH R. MARTIN, as	:	No. 3:16-cv-00121-TAV-DCP
beneficiary of the Kenneth Ray Martin Roth IRA,	:	
and MARTIN WEAKLEY on behalf of themselves	:	
and all others similarly situated,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
KPMG, LLP,	:	
	:	
Defendant.	:	
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**KPMG LLP's
PARTIAL MOTION TO DISMISS THE THIRD AMENDED COMPLAINT**

KPMG LLP (“KPMG”) moves the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to partially dismiss the Third Amended Class Action Complaint dated July 13, 2020 (ECF No. 174) (the “Third Amended Complaint”).

Count Two of the Third Amended Complaint—the claim under Section 10(b) of the Securities Exchange Act of 1934 based on subparts (a) and (c) of Rule 10b-5 promulgated thereunder—must be dismissed. This Court has already granted KPMG’s motion to dismiss that claim from the Second Amended Complaint (ECF No. 50) in its August 2, 2018 decision (ECF No. 76, Mem. Op. & Order, Aug. 2, 2018, at 25 (“Mem. Op.”)), and the newly asserted claim is identical to the previously dismissed one (*compare* Second Amended Complaint ¶¶ 274-281 with Third Amended Complaint ¶¶ 273-280). In the Sixth Circuit, as in most circuits, re-pleading a dismissed claim in an amended complaint to preserve appeal rights is not required. *Hayward v. Cleveland Clinic Found. et al.*, 759 F.3d 601, 617-18 (6th Cir. 2014). Plaintiffs’ attempt to do so

is improper, and Count Two of the Third Amended Complaint must therefore be dismissed with prejudice.

In addition, Count Three of the Third Amended Complaint—the claim under Section 11 of the Securities Act of 1933 asserted by new plaintiff Martin Ziesman, a purchaser of Series C preferred stock, on behalf of a proposed class of all purchasers of the preferred stock of Miller Energy Resources, Inc.—must be dismissed for two reasons. *First*, the claim is barred by the three-year statute of repose, because the Series C preferred shares that Mr. Ziesman purchased were *bona fide* offered to the public on September 18, 2012, more than three years prior to the filing of the initial complaint in this case. *Second*, Mr. Ziesman has no standing to assert the Section 11 claim: he did not purchase shares in the offerings at issue, he cannot “trace” his shares to any of those offerings, and he is not even a member of the proposed class.

KPMG further relies on its Memorandum of Law filed contemporaneously herewith.

KPMG requests that the Court grant its partial motion to dismiss. Because Plaintiffs have already amended their complaint three times, and because the grounds for dismissal are insurmountable, KPMG requests that dismissal be with prejudice.

Dated: July 27, 2020

Respectfully submitted,

/s/ Gregory Ballard

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2020, a copy of the foregoing was filed electronically and served via the Court's CM/ECF system on the following:

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